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**2001 OAL DETERMINATION NO. 10-L**

(Gov. Code sec. 11340.5; Cal.Code Regs., tit. 1, sec.123(c))

November 20, 2001

Michael Taflinger  
B-98978 4-229-U  
480 Alta Road  
San Diego, CA 92179

Re: Request for Determination concerning Richard J. Donovan Correctional Facility Operations Plan #30 – rule restricting inmates from submitting another visiting application for thirty (30) days after the previously-scheduled visit has been completed; OAL File No. 00-005

Dear Mr. Taflinger:

You have requested the Office of Administrative Law (OAL) to issue a determination as to whether a rule contained in Operation Plan #30 of the Richard J. Donovan Correctional Facility, which restricts the number of applications by inmates for family visits, constitutes a “regulation” of the Department of Corrections that must be adopted pursuant to the Administrative Procedure Act (APA).

In issuing a determination, OAL makes a finding as to whether the challenged rule is a “regulation” as defined in Government Code section 11342.600, which should have been, but was not, adopted pursuant to the APA.<sup>1</sup>

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1. Pursuant to California Code of Regulations (CCR), title 1, section 123, subsection (c), OAL is issuing this determination as a summary determination letter. Section 123 of title 1 of the CCR provides in part the following:

“(b) OAL shall not accept for filing any request for determination if OAL finds that the state agency rule being challenged:

- (1) has been superseded;
- (2) has expired by its own terms;
- (3) has been declared in writing by the state agency under penalty of perjury, in accordance with Code of Civil Procedure Section 2015.5, to have been rescinded or to no longer be in effect;
- (4) has been nullified by a court in a judgment that has become final;
- (5) is contained in a regulation adopted pursuant to the APA;
- (6) is contained in a California statute;
- (7) *is clearly within the scope of an express statutory exemption from the APA*; or
- (8) is the same rule, or is substantially the same (i.e., has the same effect) as a rule from the same state agency, on which OAL has already issued a determination.

“(c) If, after accepting a request for determination, OAL finds that the challenged state agency rule falls within subsection (b), OAL may at any time issue a summary determination letter instead of a determination pursuant to sections 124, 125, and 126. Any summary determination letter shall be issued pursuant to section 127. [Emphasis added.]”

The state agency rule that you are challenging is contained in Operations Plan #30, issued by the warden of the Richard J. Donovan Correctional Facility, which states as follows: "No inmate will submit another application [for family visit] for thirty (30) days after the previously-scheduled visit has been completed."

Government Code section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." OAL finds that the challenged rule meets the definition of "regulation" in that the rule is applied generally to all inmates at the correctional facility. It also implements, interprets, and makes specific Penal Code sections 5054 and 5058, and title 15, CCR, section 3170.<sup>2</sup>

However, even though the challenged rule meets the APA definition of "regulation," it falls within an express statutory exemption to the APA. In your letter addressed to OAL, dated July 10, 2000, you state the following: "My request [for] determination of Operational Plan #30 is an institution[']s policy not the department[']s. Each Warden can create an OP to carry out an inmate[']s right to visit. . . ." In its independent research, OAL found no evidence that would indicate that the challenged rule is not a "local rule." Thus, pursuant to Penal Code section 5058, subdivision (c), the following express APA exemption would apply:

"(c) The following are deemed *not* to be "regulations" as defined in Section 11342.600 of the Government Code [and therefore, are not required to be adopted pursuant to the APA]:

(1) Rules issued by the director or by the director's designee *applying solely to a particular prison or other correctional facility*, provided that the following conditions are met:

(A) All rules that apply to prisons or other correctional facilities throughout the state are adopted by the director pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code.

(B) All rules except those that are excluded from disclosure to the public pursuant to subdivision (f) of Section 6254 of the Government Code are made available to all inmates confined in the particular prison or other correctional facility to which the rules apply and to all members of the general public. . . . [Emphasis added.]"

Therefore, according to Penal Code section 5058, subdivision (c), the rule you challenge in your request for determination is not, by statute, a "regulation" because it is a local rule issued by the warden of the Richard J. Donovan Correctional Facility that applies solely to the inmates of that facility. The challenged rule, therefore,

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2. Penal Code section 5054 states the following:

"The supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein are vested in the director [of the Department of Corrections]."

Penal Code section 5058 states in part the following:

"(a) The director may prescribe and amend rules and regulations for the administration of the prisons. . . . The rules and regulations shall be promulgated and filed pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the APA], except as otherwise provided in this section. . . ."

Title 15, CCR, section 3170, subdivision (c) provides the following:

"(c) Limitations on the length and frequency of visits and on the number of persons permitted to visit an inmate at the same time will be imposed to avoid overcrowding or the unequal allocation of visiting time or for other compelling reasons."

does not violate the APA.

In your request for determination, you also state the following “two issues of concern”: “(1). The plan of operation was not and is not approved by the director of Corrections. This is in violation of [title 15] CCR 3171. (2). This plan of operation violates the inmates['] constitution[ally] guaranteed right to due process and conflicts with the department[']s regulation and statute.” (Emphasis in original.) As stated in OAL’s previous correspondences to you, in issuing a determination OAL’s authority is limited to finding whether a state agency rule meets the definition of “regulation” under Government Code section 11342.600 which should have been, but was not, adopted pursuant to the APA. Your “two issues of concern” are outside the scope of OAL’s jurisdiction, and therefore, are not addressed in this summary determination letter.

Sincerely,

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